

March 28, 2014

MT Department of Environmental Quality
Board of Environmental Review
c/o Ms. Elois Johnson
P.O. Box 200901
Helena, MT 59620-0901

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DEQ
Planning Division

MT Department of Environmental Quality
c/o Ms. Carrie Greeley
P.O. Box 200901
Helena, MT 59620-0901

RE: Statewide Numeric Nutrient Standards - Comments

To Whom it May Concern:

Stillwater Mining Company (Stillwater) offers the following comments on the proposed amendments to the Administrative Rules of Montana with respect to the numeric nutrient criteria contained in draft Circulars DEQ-12A and DEQ-12B, as well as the draft implementation guidance document. Stillwater has operating mines in Stillwater and Sweetgrass Counties along with an operating Smelter and Base Metals Refinery in Columbus. As you'll note, many of our comments will echo those expressed by the Montana Petroleum Association, Montana Mining Association, and other vested dischargers and interested members of the public.

Stillwater currently employs over 1,700 Montanans in addition to numerous independent contractors, consultants, and supporting industries making Stillwater the largest industrial employer in the State. On average, Stillwater's annual expenses exceed \$750,000,000, a significant portion of which is spent in the State. In addition, during 2012, Stillwater paid over \$17,500,000 in taxes including \$7,400,000 to Stillwater County; \$3,300,000 to Sweetgrass County; and \$6,800,000 to the State of Montana.

Stillwater maintains MPDES discharge permits at the Stillwater and East Boulder mines, as well as MPDES stormwater permits at both mines and the processing facilities. The proposed numeric nutrient criteria and associated variance process will directly impact Stillwater's operations at all three locations, and therefore, Stillwater has a vested interest in the development of reasonable nutrient standards and associated rules.

1. Stillwater recognizes and appreciates the fact that the Montana Code requires promulgation of a rule establishing base numeric nutrient standards and that the Board and Montana Department of Environmental Quality (Department) have a non-discretionary duty to do so. However, Stillwater also recognizes the efforts in the 2011 Legislature in SB-367 to create authority for the Department to grant variances for point source dischargers for nitrogen and phosphorous limits in numeric nutrient stands which cannot be met given existing technology. The limits of technology and the fact that the technology is not cost-effective were the bases for the Legislature's

decision to adopt variances. It is our interpretation that SB-367 provided that if a discharger, compliant with the caps set in Section 75-5-313(5)(b)(i) and (ii), MCA, cannot meet the applicable numerical nutrients standard, the discharger will be granted a variance. Without the variances, substantial and widespread economic impacts would result if Montana Law required immediate compliance with numeric nutrient limits imposed by the new standards.

Stillwater further recognizes and appreciates the Department's efforts to work with all stakeholders, including industry, to develop rules and guidance to implement the provisions of SB-367. Significant time and effort was spent in evaluating and clarifying the effects of the proposed numeric nutrient criteria on 'new or expanded' dischargers, specifically in cases where proposed new or increased point sources are subject to Montana's non-degradation rules, Section 75-5-303, MCA. However, Stillwater does offer the following comments specific to the Department's Authority on Variances.

- The Department has included the following comment on this issue within the Base Numeric Nutrient Standards Implementation Guidance document: "The provisions for general, individual, and alternative variances in section 75-5-313, MCA, are available to all discharge permit holders and are not limited to dischargers under permit on the effective dates of DEQ Circular DEQ-12A or DEQ Circular DEQ-12B." Stillwater appreciates the Department's effort to clarify the availability of General Variances to all discharge permit holders in the Guidance document, but this provides a lesser degree of regulatory and legal protection than inclusion of the same statement in the Administrative Rules of Montana and DEQ-12B. For this reason, Stillwater requests the aforementioned variance language in the Implementation Guidance also be included within the Administrative Rules of Montana and DEQ Circular DEQ-12B; or at a minimum, the Department state for the record that the Department's position on issuance of the General Variance will be the same for private and public entities and that the General Variance will be available to new and increased discharges on the same basis as for existing permit holders.
- On pages 10 and 11 of DEQ-12, the Department describes the rationale for amending the rule as being required, in part, to "incorporate the nutrient standards variance limits". Stillwater does not believe that the draft language is accurate. Rather, Stillwater recommends that the Board modify the language in all three sections to strike "nutrient standards variance limits" and replace it with "the Department's authority to grant variances from the numeric standards for permittees."
- In describing the inability to meet proposed numeric nutrient criteria, the Department's draft refers to the inability of permittees to meet the numeric concentrations imposed by the new standards as a problem which would arise "in many cases". The use of "many" is inappropriate in this context. It is clear from the actions of the Legislature and the plain language of SB-367 that "most" or "virtually all" should be insert in the place of "many" in describing the reason for the adoption of the draft rule. In addition, the Department has written that the

“statute allows dischargers to be granted variances from base numeric nutrient standards in those cases where meeting the standards today would be an unreasonable economic burden or technologically infeasible.” This should be rewritten to reflect that “the statute requires the Department to grant general variances from base numeric nutrient standards in those cases where meeting the standards today would be an unreasonable economic burden or technologically infeasible and the permittee meets the end-of-pipe treatment requirements in DEQ-12B.”

2. On page 7 of DEQ-12, the Department proposes to add a section 2 to ARM 17.30.619 as a non-severability clause. It is recognized that the general variance provision internalized in the rule to be promulgated by the Department and amplified in DEQ-12B will be of no effect if, after promulgation of the rule, EPA disallows a permit with a general variance for the reason that the Department allowed the permittee to deviate from the numeric nutrients standards based upon the application of a general variance. The 2011 Legislature, without opposition from EPA, used mandatory language in Mont. Code Ann. § 75-5-313(5)(b) to require the Department to incorporate a general variance in permits if the permit applicant meets certain conditions. If EPA, in turn, refuses to allow a permit with a general variance to take effect as a result of the inclusion of the variance, the intent of the statute has been nullified with respect to the permittee. In such a circumstance, the rules should not continue to bind permittees. Therefore, Stillwater asks the Board to amend the language employed by the Department in the rule as noted in the italicized language as follows:

If (1) a court of competent jurisdiction declares 75-5-313, MCA, or any portion of that statute invalid, (2) the United States Environmental Protection Agency disapproves 75-5-313, MCA, or any portion of that statute, under 30 CFR 131.21, or if rules adopted pursuant to 75-5-313(6) or (7), MCA, expire and general variances are not available, *or (3) after the date of the promulgation of this rule, the United States environmental protection agency nullifies or otherwise disallows a permit with a general variance issued by the Department based upon the Department's inclusion of a general variance in the permit,* then (1)(e) and all references to DEQ-12A, base numeric nutrient standards and nutrient standards variances in ARM 17.30.201, 17.30.507, 17.30.516, 17.30.602, 17.30.622 through 17.30.629, 17.30.635, 17.30.702, and 17.30.715 are void, and the narrative water quality standards contained in ARM 17.30.637 are the standards for total nitrogen and total phosphorus in surface water, except for the Clark Fork River, for which the standards are the numeric standards in ARM 17.30.631.

Without the addition of this language to the rule, the rule will remain in force if EPA rejects a permit with a general variance for the permittee because EPA does not believe the permittee is entitled to a general variance.

3. Stillwater requests that language be added to DEQ-12A that future violations of numeric nutrients standards should only be considered in context to the “nuisance level threshold” for algae in stream, at that time. In short, a violation of the numeric nutrients standards should only be considered in combination with the the amount of *chlorophyll a* in-stream, in determining the site-specific and potential impact of water quality exceedences, thus allowing for the numerous site-specific and seasonal variations and assimilative capacity of the stream to be taken into account.
4. It is recognized that Montana is among a small number of states which have moved to adopt numeric nutrient standards for rivers and streams. At present, none of our neighboring states have adopted numeric nutrient standards, and these states, among many others, have retained narrative standards for nutrients because they remain legally viable under federal law. With Montana’s leadership role comes an added responsibility to guarantee that all of the associated regulations are accurately updated to ensure a regulatory process that continues to function smoothly and effectively.

Stillwater, as a leading industrial employer in the state, is generally concerned about Montana taking a leading role, ahead of most of the United States, in implementation of numeric nutrient standards that are not achievable by current water treatment technology. If not managed properly, this could hinder economic growth and/or a protracted legal battle, as demonstrated by the state of Florida recently. Specifically, without carefully planning and addressing all implementation issues, this action could affect natural resource development; economic growth in Montana’s cities, towns, and counties; as well as the agricultural industry. EPA’s own Science Advisory Board (SAB) in 2009 advised EPA that “numeric nutrient criteria developed and implemented without consideration of system specific conditions can lead to management actions that may have negative social and economic and unintended environmental consequences without additional environmental protection.”

5. Stillwater remains concerned about how the Department will analyze whether downstream uses are adequately protected when an applicant seeks a variance based upon water quality modeling. In principle, Stillwater tends to agree with comments submitted by the League of Cities and Towns, in which the League noted:

The reference to “protection of downstream use” should be removed from the proposed documents or use language similar to the following: “dischargers shall only be responsible for the protection of downstream use to the first location of a non-point source loading”. Without defining the extent a point source discharger is responsible for protection of downstream use and without recognition of non-point source contribution, the language is not acceptable.

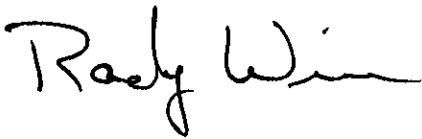
Unfortunately, the lack of clarity on this point has continued through the development of the rule package. In fact, in the guidance document, the Department states, “[a]ny reach-specific criteria developed for a receiving stream using a mechanistic or empirical model will also need to protect downstream beneficial uses. ... “How far

downstream” is a consideration which will vary from case-to-case....” It is problematic to promulgate the rule packages without a better idea of the touchstones for the Department’s analysis because parties are left to their own devices to determine whether the answer is the point of the next discharge downstream or the Gulf of Mexico.

6. Stillwater is concerned that the overarching problem of non-degradation has not been addressed by Rule and urges the Department and Board to address the non-degradation issue prior to finalization of these rules and DEQ-12B. Stillwater believes this is appropriate as the intent of SB-367 was not to establish a variance system only to have it nullified by the non-degradation review process.

We appreciate and express our gratitude to the members of the Nutrient Working Group and the staff and officials in the Department of Environmental Quality for their significant efforts and time in developing the draft numeric nutrient standards and circulars. However, Stillwater is generally in opposition to promulgation of the proposed numeric nutrient rules at this time, noting that there remain significant ‘unknowns’ or ‘uncertainties’ about how the new rules will be implemented and their impact on both private and public dischargers. If proposed nutrient rules and standards are adopted, Stillwater believes these comments need to be considered and acted upon in advance. As such, we look forward to continuing to work with the Department in resolution of these concerns and the successful development and implementation of numeric nutrient standards.

Respectfully,



Randy Weimer
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Stillwater Mining Company

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Cc: Mr. Bruce Gilbert, SMC
Mr. Matt Wolfe, SMC
Mr. David Johnson, SMC